STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 12, 2014
v	No. 314373 Saginaw Circuit Court
PHILLIP LAMAR PATTON, Defendant-Appellant.	LC No. 12-037304-FH

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of one count of carrying a weapon with unlawful intent, MCL 750.226; seven counts of felony firearm, MCL 750.227b; one count of felonious assault, MCL 750.82; two counts of unlawful imprisonment, MCL 750.349b; two counts of armed robbery, MCL 750.529; and one count of assault with intent to do great bodily harm less than murder, MCL 750.84. We affirm.

On appeal, defendant first argues that he was denied due process and equal protection because there was a "marked absence" of African Americans in the jury venire from which his jury was selected. While a defendant is entitled to an impartial jury drawn from a fair cross-section of the community, "[t]o properly preserve a challenge to the jury array, a party must raise this issue before the jury is empanelled and sworn." *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003), citing *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). As our Supreme Court held in *People v McCrea*, 303 Mich 213; 6 NW2d 489 (1942), "[t]he law is well established that a challenge to the array, made after a verdict of guilty, comes too late." *Id*. at 278. More specifically, the *McCrea* Court, quoting 35 CJ, p 377, held:

> But the objection is too late * * * after the jury has been impaneled and sworn * * * unless it appears that the irregularity was intentional. * * * If no objection was made at the trial as to the manner of selecting or summoning the jury, it is too late to urge the objection for the first time after verdict, even though the objection was not previously known, unless it appears that the objecting party was prejudiced thereby. [*McCrea*, 303 Mich at 278.]

In this case, defendant failed to make any objection regarding the composition of the jury array before the jury was impaneled and sworn, an intentional irregularity has not been established, and defendant has failed to show prejudice. Thus, whether this issue is considered

waived or forfeited—a disputed issue between the parties—defendant is not entitled to appellate relief. That is, even if the issue is considered forfeited rather than waived, defendant did not demonstrate plain error affecting his substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). First, defendant failed to set forth any basis for concluding that African-Americans were underrepresented in his jury venire. See *People v Bryant*, 491 Mich 575, 581-582; 822 NW2d 124 (2012). Second, even if there was error, and it was plain, defendant cannot establish prejudice because the evidence overwhelmingly supported his convictions. See *Carines*, 460 Mich at 763. Both victims identified defendant as the perpetrator, and defense counsel conceded that defendant entered the victims' residence with a gun. Counsel also acknowledged that the gun went off twice during a struggle between defendant and one of the victims, and that defendant "decided to take" the other victim with him following the shooting. Accordingly, this issue is without merit.

Moreover, we note that defendant's motion requesting an evidentiary hearing on remand was previously denied by this Court. *People v Patton*, unpublished order of the Court of Appeals, entered January 30, 2014 (Docket No. 314373). To the extent that defendant continues to argue that remand for an evidentiary hearing is appropriate, we disagree. Defendant has failed to support his request for a remand with an affidavit or offer of proof regarding the Saginaw County jury selection process in general or the jury selection process in his particular case; therefore, defendant has failed to establish entitlement to such relief. See MCR 7.216(A)(7).

Next, defendant argues that trial counsel's failure to object to the jury venire constituted ineffective assistance of counsel. We disagree.

A defendant bears a heavy burden to show that counsel made errors so serious that he was not performing as the counsel guaranteed by the Sixth Amendment and the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). An attorney's decisions regarding the selection of jurors are generally matters of trial strategy and, here, defendant has failed to overcome the presumption that his counsel's performance constituted sound trial strategy. See *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Further, to succeed on an ineffective assistance of counsel claim, a defendant must establish prejudice, meaning the defendant must show there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Stanaway*, 446 Mich at 687-688. Here, even if his counsel's performance was considered deficient for failing to object with regard to the jury venire, defendant cannot establish prejudice. As discussed above, the evidence against defendant was overwhelming. Thus, defendant's ineffective assistance of counsel claim is without merit.

Finally, defendant argues that the trial court abused its discretion when it denied his request for a jury instruction on the necessarily included offense of larceny from the person. We disagree. The decision whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

Here, defendant was charged with armed robbery and requested that the jury be instructed on larceny from the person because there was "a question of force being used in connection with

what would amount to the taking of the phone and perhaps some cash in this particular case as opposed to the force in connection with the assault." The prosecutor opposed the request, arguing that there was no basis to give the larceny from the person instruction because it was undisputed that defendant was armed with a loaded pistol during the entire criminal event. The trial court denied defendant's request for the instruction, holding that the instruction was not applicable because defendant was armed with a pistol during the entire criminal transaction. The court noted that "he was armed with a pistol from the time he came in the door to the time he left the home." Thus, there was no basis to give the larceny from the person instruction. We agree with the trial court.

First, larceny from the person is no longer a necessarily included lesser offense of robbery. *People v Smith-Anthony*, 494 Mich 669, 687 n 53; 837 NW2d 415 (2013). The 2004 amendments to Michigan's robbery statute codified the transactional theory of robbery which "allows a robbery conviction even where a defendant uses force for the first time after completing a taking." *Id*. at 686. "Therefore, robbery does not require that the taking have been made in the 'immediate presence' of the victim. As a result, larceny-from-the-person is no longer a necessarily included lesser offense of robbery." *Id*. at 687 n 53.

Second, defendant's claim—that "the elements of force and intent to permanently deprive were sufficiently in dispute to allow the jury to find [defendant] not guilty of the robbery offense but guilty of larceny from a person"—is unsupported by the record evidence. Both victims testified that defendant forced his way into their home by brandishing a handgun, which he kept pointed at the victims for the duration of the time he was in their apartment. One of the victims was shot twice and the other victim was struck with the gun, causing him to fall to the floor. Defendant took three cell phones and some money belonging to one of the victims, and one cell phone and an identification belonging to the second victim. A rational view of this evidence does not support an inference that defendant participated only in a larceny, without using force or violence to accomplish the taking. Accordingly, the trial court did not abuse its discretion when it denied defendant's request for a jury instruction on larceny from the person. *Gillis*, 474 Mich at 113.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Cynthia Diane Stephens